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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES OF AMERICA, COMPLAINANT,

v.

JOHN F. SHIPP AND OTHERS, DEFENDANTS.

BRIEF FOR THE UNITED STATES ON CLAIM THAT DENIALS UNDER OATH PURGE CONTEMPT.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES OF AMERICA, complainant, *v.* JOHN F. SHIPP AND OTHERS, defendants.	No. 12, Original.

BRIEF FOR THE UNITED STATES ON CLAIM THAT DENIALS UNDER OATH PURGE CONTEMPT.

The rule was thus stated in the time of Holt, Chief Justice: *Per curiam:* "If one brought in, in contempt, deny all upon oath, he is of course discharged of the contempt; but if he has forsworn himself he may be prosecuted for perjury." (*King* v. *Sims*, 12 Mod., 511.)

Lord Mansfield briefly stated the practice and glanced at the entire field in *King* v. *Vaughan* (2 Doug., 516). That was a rule for an attachment against an attorney for acting as such after having been struck off the roll:

> If the defendant, by his affidavit, fully denies the charge on which the rule for an attachment was granted, that is sufficient; the weight of the evidence or the credibility of what is sworn is never considered;

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> but if the defendant is hardy enough to swear falsely, he is left to be punished by indictment. In chancery they proceed differently; they examine the defendant on interrogatories, and also examine witnesses on both sides, and then decide upon the truth of the charge.

See also 2 Hawkins, Pleas of the Crown (6th ed., ch. 22, p. 213), for a full discussion of the doctrine and practice, from which it is evident that the old rule was laid down with regard to official misconduct by sheriffs, bailiffs, attorneys, inferior judges, jailers, jurors, etc., and relates to contempts of the King's writs, contempt in the face of the court, contemptuous words or writings concerning the court, contempt of its rules or awards, abuses of process, forgeries of writs, and other deceits. Contempt of its award refers only to such a case as submission to arbitration and then refusal to perform the award.

Lord Brougham, for instance, in *Wellesley's Case* (2 Russell & M., 639, 667), considering the distinction between civil and criminal contempts, and citing two cases in the King's Bench, says that nonperformance of an award being a disobedience was a contempt of the court, and so might be regarded as technically speaking and in form an offense; but it had been held that, as it related simply to a civil matter and was rather *in the nature of process to compel the performance of a specific act*, the matter was in substance not criminal but

civil. *Wellesley's Case* is also interesting, because arguments of counsel endeavored to show that there is no just distinction between civil and criminal contempts; that the only real distinction is between simple disobedience and disobedience of an aggravated kind, altho the object in every case is the same—to effect compliance with the order of the court.

Of course a positive command of the court, like the order of the court in the present case, must nevertheless always have been embraced within the power and, one would think, within such comprehensive statement of the practice; but the authorities do not say so. The inference is manifest that the rule of conclusiveness of answer was restricted to comparatively trifling offenses by official persons. (For example, *Matter of Fitton*, 16 How. Pr., 303.) There is no case anywhere to sug gest that it was ever predicated of a crime of the highest magnitude which was also a contempt because it was such a crime.

Coming at once to recent statements, this is what Mr. Justice Brown said (when district judge) in the *May* case (1 Fed. Rep., 737, 743): "It is a cardinal rule in proceedings for a criminal contempt that the answer of the respondent can not be traversed and must be taken as true. If false, the Government is remitted to a prosecution for perjury," citing Blackstone, *United States* v. *Dodge* (2 Gall., 313), and other cases. "But the answer must be credible and consistent with itself and [if

not] the court will be at liberty to draw its own inferences from the facts stated," citing two cases in the Term Reports. "So, then, it is after all a question in every case whether the facts are consistent with an honest intent." The charge there was that a juror had corruptly conferred with a defendant under indictment and on trial. Respondent admitted the interview, but explained the circumstances, denying corrupt purpose or any intention of contempt. Nevertheless the court adjudged him guilty. So that the learned justice in that case exercised his discretion and applied the exception and not the rule. Sound judicial discretion controls. (*In re Perkins*, 100 Fed. Rep., 950, citing *Savin's case*, 131 U. S., 267.)

As to the difference in equity:

> If the answer of a defendant in questions of contempt were conclusive, a decree might lose all its vitality and not be enforced at all. The temptation, in many cases, to defeat the efficacy of a decree by sturdy denial of imputed contempt might be too strong for the virtue of a party. The rule therefore is regarded as well settled in England and in this country that in chancery testimony will be heard to contradict as well as to support the truth of a statement made by one against whom proceedings for contempt had been instituted. (*Underwood's Case*, 2 Humph., 46, 49.)

In another chancery case, where there was no wilful intention to disregard the court's authority

or dignity, it was held that "the breach of the injunction consists in doing the forbidden thing and not in the intention with which it is done." (*Thompson* v. *Penna. Railroad Co.*, 48 N. J. Eq., 105, 109.)

United States v. *Anonymous* (21 Fed. Rep., 761), an equity case, reviews the law of contempt exhaustively and affirms the rule in equity, citing many authorities. In the *Debs* case in the lower court (64 Fed. Rep., 724, 738), the chancery rule is again laid down, and in *United States* v. *Sweeney* (95 Fed. Rep., 434, 446, 447), a similar case in equity, the *Debs* decisions below and here are cited for that rule. Probably the reason why "in chancery they proceed differently" was always what it is stated to be in modern law—there may be no "wilful intention of disobeying the injunction," there may be an absence of wilful intention to contemn the court's dignity and authority and to disregard its order, and yet the court is warranted in taking action *in personam*, because, where there is the infringement of a private right, it is no answer to the complaint of the injured party to say that the party inflicting the injury meant no disrespect to the court. At the same time in remedial as well as punitive contempt proceedings the court deals with the matter as affecting its dignity and power as well as an infringement of a private right. (Pitney, Vice-Chancellor, and authorities cited in *Thompson* v. *Railroad Co.*, *supra*.)

> Without the power to enforce these decrees by punishing disobedience and violation of them, a court of chancery would be worse than useless, and for this reason, perhaps, the practice on the point we are considering differs from that of a court of common law. (*Underwood's case, ut supra.*)

But it is just as important to enforce the orders of a court of law by punishing disobedience and violation of them, and the authority of the court and the compulsions of the criminal law are quite as sacred as property rights. The "perhaps" in the above quotation and the "at least" of Justice Gray in *Cartwright's Case, infra*, imply modern dissatisfaction with the distinction. It is not that the equity rule is wrong, but that the rule at common law ought to be the same.

Returning to the rule at law—it was thus referred to in *Savin, petitioner*, already frequently cited. It was there contended that the court should have required the service of interrogatories so that the respondent in answering them could purge himself of the contempt charged.

> The court could have adopted that mode of trying the question of contempt, but it was not bound to do so. It could, in its discretion, adopt such mode of determining that question as it deemed proper, provided due regard was had to the essential rules that obtain in the trial of matters of contempt. * * * If the appellant was entitled, of right, to purge himself under oath

> of the contempt, that right was not denied to him; for it appears from the proceedings in the district court, made part of the petition for habeas corpus, not only that he was informed of the nature of the charges against him by the testimony of Flores, taken down by a sworn stenographer at the preliminary examination, but that he was present at the hearing of the contempt, was represented by counsel, *testified under oath in his own behalf*, and had full opportunity to make his defence. (Per Mr. Justice Harlan, 131 U. S., at pp. 278, 279.)

In other words, his oath did not clear him; he had full opportunity to make his defense, but he had to make it, and was adjudged guilty. That was a direct contempt, as was the offense in *Ex parte Terry* and other cases before the court. The point seems never to have been squarely presented or adjudged in this court, either as to direct or constructive contempts, altho, of course, as to contempts in the face of the court no court would apply the common-law rule but would construe the facts and determine wholly for itself and from its own observation. The point might have been adjudged, however, and the failure to raise and clearly decide it in constructive contempts or direct contempts not in actual presence of the court seems to show that the rule is by no means obvious and certain in recent times. For instance, the point was manifest in *In re Watts and Sachs* (190 U. S., 1), a case of constructive contempt, and yet

it was not made and the case was argued and decided on the question of jurisdiction and the proposition that attorneys are not guilty of contempt for a mere error of judgment when advising in good faith. It is very clear that no one thought of invoking the common-law rule in that case, for the answers were traversed and oral and documentary evidence adduced, and petitioners were found guilty of contempt by the lower court. (190 U.S., at foot of p. 15.)

In *People against Few* and others (2 Johns., 289), the offense charged was characterized by the court as an "impropriety." In *Matter of Moore* and others (63 N. C., 397, 405, 406, 408), there was a political attack profest to have been directed against the individuals who were judges and not to have been intended to impair the respect due to the court's authority. The court vindicated its power of self-protection, characterized the publication as libelous, but discharged the rule, saying:

> The law is well settled in this class of cases *where the intention to injure constitutes the gravamen.*
>
> The rule rests on sound reason. In this proceeding, as the court is judge in its own case in the *first* instance, where a case is made out in the judgment of the court, the party in the *last* instance is allowed to *try himself*. His *intention* is locked within his own breast, is known to himself alone, and he is permitted to purge himself by his own

> avowal. He can not be convicted, *if he is innocent*, as he may be *by false evidence, before a jury*. For the court does not try him—he tries himself. C. J. Wilmot's Opinion, 257-8, referred to on the trial of Judge Peck, 507. If the party, after the court decides against him, declines to *try himself*, it must be because *he knows himself to be guilty*.

The italics are the court's. The last sentence is significant here as showing that the court need not admit the purging force of the answer; it is within the discretion of the court; and that no defendant wishes his answer to be conclusive if the court decides against him on that denial, but wishes to go on and be tried. He naturally wishes then to adduce evidence himself.

The North Carolina case only shows that when the insult was disavowed the court acted with a high sense of generosity and decorum and excused. The respondent "is not *acquitted*, but is *excused*." That was far worse than an impropriety; it was a direct insult upon the judges, but it was not a crime. So in other cases: *In re Walker*, 82 N. C., 95, was not only a constructive contempt, but it was a technical and relatively trifling matter, an alleged obstruction of process without intentional disrespect. See *State* v. *Earl* (41 Ind., 464); *Burke* v. *State* (47 Id., 528); *Haskett* v. *State* (Id., 51, p. 176); *Oster* v. *People* (192 Ill., 473, 479), wherein it was said: "In criminal contempts alleged to have been committed out of the presence of the

court, if the contemnor's answer is sufficient to acquit of the charge he must be discharged." That means, I think, that an answer consistently explaining the facts and denying intent is sufficient to *excuse*, not acquit; it does not mean that merely to deny the facts wholly acquits, where the gravamen is crime and a disclaimer of *intention* to commit *contempt* really plays no part. The *intention* to commit the *crime* and the commission of it (to be established by proof) dispose of any disclaimer of intention to commit contempt. At least that disclaimer can not be conclusive at this stage, but proof must be offered in support of it.

On the other hand, there are numerous authorities which refuse to follow the rule, e. g., *Hughes* v. *People* (5 Colo., 436), *State* v. *Simmons* (1 Ark., 265), *Matter of Snyder* (41 N. Y., 302). See also this case on appeal (103 N. Y., 178, 181) wherein the court said: "The surrogate was not necessarily concluded by these bald and uncorroborated assertions of the defaulting executor, and as the question is not only one to be determined upon evidence, at least conflicting, but also rests in discretion, which has not been unfairly exercised, we find no ground on which we can review his decision." *Wise* v. *Chaney* (Circuit Judge, 67 Iowa, 73) is a similar case. *Crow* v. *The State* (24 Tex., 12, 14) precisely rules the point, the court saying:

> The party is entitled to answer, and the answer should be under oath, showing cause, if any he can, why the judgment nisi

> should not be made absolute but should be set aside. It is for the court to decide whether the answer purges the contempt or not. The court is not confined to the answer, but may hear other evidence upon the question of fact involved.

In *Cartwright's Case* (114 Mass., 230) Mr. Justice Gray, as chief justice of the Supreme Judicial Court of Massachusetts, discusses the power to punish for contempt, and says:

> "As regards the question whether a contempt has or has not been committed, *it does not depend upon the intention of the party, but upon the act he has done*." By Taney, C. J., in *Wartman* v. *Wartman* (Taney, 362, 370). In a court of chancery, *at least*, his oath is not conclusive in his favor, but may be contradicted by other evidence [citing *King* v. *Vaughan*, *supra*, among other authorities]. But in the present case his own testimony fails to clear him, etc.

(The italics are mine.) That is to say, Mr. Justice Gray does not appear to look with favor on the old rule in the courts of law and he approves the discretion which held that the respondent's contempt was not purged by his answer. The situation there suggests again that an answer to have this force must explain satisfactorily, must confess and avoid; bare denial is not enough. "A mere disclaimer of intention of contempt does not purge the contempt or relieve the party of the consequences of the act committed by him." (*Watson* v.

Bank, 5 S. C., 159, 182.) That case cites an equity authority, but was not itself an equity case.

> It is further claimed that the respondents, having been examined as witnesses under oath, and having testified that they acted in good faith and intended no disrespect to the court, thereby purged themselves of the contempt, and that no further proceedings could thereafter be had against them except a prosecution for perjury. That may be the practice in some jurisdictions, but we agree with the Supreme Court of New Hampshire that the better practice is to receive other testimony and settle the whole question of contempt in one proceeding. (*Huntington* v. *McMahon*, 48 Conn., 174, 200, 201, citing *State* v. *Matthews*, 37 N. H., 450.)

I submit that the following deductions from the foregoing review are sound:

The rule has shifted from the old common-law statement; on the whole, it is weakening; it is no longer true that bare denial of the fact suffices—either denial of the facts alleged or the *factum* of contempt existing in those facts. A respondent now sets forth by his answer his version of the facts, matters in extenuation, disclaimer of intention. It must be consistent and credible in itself; a court has discretion to construe and allow or reject it. Sometimes, in effect, the disclaimer is an apology to the court, which is received as matter of grace. The rule applies to matters technical in their bearing and affecting official relations to the

court, which often involve serious offenses, it is true, but not grave crimes. There is much conflict of authority thruout this country, and many well-considered decisions reject the rule. Originally the rule seems to have applied exclusively to officers of the court, or of the executive, or to jurors, and to have related to minor matters not embracing the breach of an order by any person which led to a major crime. Probably at that time the rule had not been fully established that the power over contempts does not depend on the question whether the offense might or might not be punished by indictment. Indictment would be preferred, and such crimes would naturally go to prosecution in that course.

At all events, regarding the development of the power in contempt and of the rule since those days, it seems absurb to maintain now the distinction between courts of law and chancery, whatever the reasons for the distinction once were or however the distinction is now sustained for the benefit of property rights. That is to say, if to protect mere rights of property thru the equity jurisdiction an answer denying contempt in violating an injunction is not conclusive, why should it be conclusive in a court of law, proceeding, as it may, to vindicate its own dignity and authority and the sanctions of the criminal law? No valid reason can be given, and in these days the distinction should cease and the rule in equity be extended to the whole field.

This sheriff was an officer of the executive of the local government. I can not see why it is material to consider whether the court's order constituted him an officer *pro hac vice* of this court, or operated upon him as an individual citizen, being the officer of the State, who had legal custody of Johnson, or strictly as such officer. If the Government of the United States operates over every foot of American soil and upon every individual by means of physical force, if necessary, how can it be doubted that within that power, and as a branch of it, this court's order went to Sheriff Shipp with sovereign force in whatever capacity he is regarded, having in fact the legal custody of the prisoner?

In *Ex parte Siebold* (100 U. S., 371, 395) the "official agents" of the United States happened to be officers of the United States, special deputy marshals appointed under an act of Congress, and the language just referred to was dealing with a possible clash between State and Federal authority and the respective functions of the State and the Nation as to the preservation of peace and good order. But was not Mr. Shipp an agent of this court when he received that order, and being such, was he not an official agent of the United States, even if he was not strictly an officer of the court or of the United States *pro hac vice?* Surely he was a person subject to the order of the court, and was an agent of the court for the purpose of obeying the order and carrying out its command by retaining the prisoner in safe custody.

The order of the Circuit Court was—

> That the petitioner be remanded to the custody of the sheriff of Hamilton County, Tenn., to be detained by him in his custody for a period of ten days, in which to enable the petitioner to prosecute an appeal from this order, if he may be advised that an appeal lies and may so choose, and in default of the prosecution of an appeal within said time, to be then further proceeded with by the State court under its sentence; the order on the sheriff to retain custody of the prisoner for the period of ten days for the purpose above mentioned being made on the application of the prisoner himself.

The order of this court was that "all proceedings against appellant be stayed and the custody of the said appellant be retained pending this appeal."

The authorities on the particular point are not numerous. Mr. Justice Story, in *Randolph* v. *Donaldson* (9 Cranch, 86), announced this rule:

> For certain purposes and to certain intents, the State jail lawfully used by the United States may be deemed to be the jail of the United States and that keeper to be keeper of the United States.

In a civil matter issuing in proceedings in contempt the Supreme Court of Illinois has held that—

> When a court makes an order appointing a particular person a depositary of the court funds, and such person, knowing of such or-

> der, accepts the deposit, he unquestionably becomes *pro hac vice* an officer of the court. (*In re Western Marine & Fire Ins. Co.*, 38 Ill., 289.)

But that case was distinguished, and the rule in that broad form somewhat doubted, in *Southern Development Co.* v. *Railway Co.* (27 Fed. Rep., 344), and *Cartwright's Case* (*ante*) was also distinguished as being a case where there was no doubt about the official relation.

The point was nearly ruled in *In re Birdsong* (39 Fed. Rep., 599), wherein it was held that—

> For the purpose of safely keeping, properly caring for, and humanely treating prisoners committed to his custody by a court of the United States, a keeper of a county jail of a State, who receives such prisoners, and is paid for their maintenance, is an officer of the United States court. (Head note.)

Returning, in conclusion, to the rule and the view that at least a court has discretion to determine whether it will discharge upon the sworn answers—there is no doubt of this; it is an essential part of the court's unlimited power with respect to contempts. But it is impossible to suppose that this court would so exercise its discretion as to discharge at this stage upon bare denial defendants who, if guilty, according to one of their counsel, "deserve no quarter." That is a hard saying, too hard; but they would certainly deserve punishment, and the Government is entitled to the

opportunity to prove its case, and if proved to bring the defendants before the court for such penalty as it may see fit to impose. I take it to be conceded by the defendants that, assuming the facts alleged in the information to be true and the defendants to be guilty of the conspiracy and the crime perpetrated as charged, their acts were a "disobedience or resistance" of the order within the statute.

This was in strict law a constructive and not a direct criminal contempt; but its nature and circumstances make it quite as grave in essence as misbehavior in the face of the court. Flat disobedience of an order of the court by lawless persons at a distance, and collusion therewith, ending in a capital crime, are indeed much more serious than ordinary misbehavior and indecorum in the presence of the court. The import of the word "constructive" must be qualified by remembering that some constructive contempts are worse than direct contempts. There are interminable confusions and unwarranted distinctions in the law of contempts between *ordinary* and *extraordinary*, *civil* and *criminal*, *direct* and *constructive*, *remedial* and *punitive*; but this was *aggravated*, which makes it unnecessary to pursue the distinctions. There are many contempts "as aggravated as those directed at the court itself in open court." (*United States* v. *Anonymous*, *supra*, and instances noted, 21 Fed. Rep., at pp. 769, 770.)

Probably there is no case like this in the books; I can find none. But if a contempt should consist, as this one did, in a conspiracy to murder and in murder accomplished, or in arson, is it reasonable or possible to contend that a criminal may thus limit the power of punishment, and, because the proceeding is by contempt and not by indictment, deny his crime and then be liable to the bare possibility of the lighter charge of perjury? It is just about as reasonable to say that this should be his right under a plea of not guilty to an indictment.

In other words, a contempt committed by a crime is none the less a crime because it is a contempt (*Debs's* case, 64 Fed. Rep., at p. 753), and the court should deal with the acts as crime, altho proceeding as for a contempt. It is to be remembered that this was not a mere breach of injunction in equity; it was not only a "criminal contempt" in the narrow technical sense; it was the crime and sin of murder, whether or not the guilt of any defendant now before the court is established. The anomaly of "trying a man on his own oath," which Blackstone excused as in favor of liberty (4 Bl. Com., 287), ought not to survive into these days. This case shows that it is not in favor of liberty but in favor of crime.

HENRY M. HOYT,
Solicitor-General.

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